***United States Court of Appeals***

***for the Second Circuit***


# PETITIONER'S BRIEF

# NO. 75-4285

# United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

ROMO PAPER PRODUCTS CORP.,

*Respondent.*

On Application for Enforcement of an Order of
The National Labor Relations Board

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD


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# INDEX

## AUTHORITIES CITED

**Statute**:

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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### STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.

### STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act,

as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order (J.A. 35-37)[1] issued against Romo Paper Products Corp. (herein "the Company") on September 23, 1975, and reported at 220 NLRB No. 81. This Court has jurisdiction since the unfair labor practices occurred within this judicial circuit, where the Company is engaged in the manufacture, sale and distribution of writing pads and related products.

## I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.[2] In addition, the Board found that the Company violated Section 8(a)(1) by leading a group of employees in a physical assault upon another group of employees who were engaged in peaceful picketing outside the Company plant.[3]

### A. Background

The Company, a New York corporation, is engaged in the manufacture, sale and distribution of writing pads and related products. The

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[1] "J.A." references are to the Joint Appendix. References preceding a semicolon are to the Board's findings of fact; those following are to the supporting evidence.

[2] Folding Box, Corrugated Box and Display Workers Union, Local 381, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO.

[3] The Board adopted, *pro forma*, the Administrative Law Judge's finding in this respect, as the Company took no exceptions thereto (J.A. 14). It is well settled that under Section 10(e) of the Act the Company is precluded from raising in this Court an objection not raised by it before the Board. *N.L.R.B.* v. *Local 3, International Bro. of Elec. Wkrs.*, 362 F.2d 232, 234-235 (C.A. 2, 1966); N.L.R.B. v *Park Edge Sheridan Meats, Inc.*, 323 F.2d 956, 959 (C.A. 2, 1963); *N.L.R.B.* v. *Enterprise Association, etc.*, 285 F.2d 642, 646-647 (C.A. 2, 1960).

events herein involved the employees in the Company's plant on 36th Street in New York City, its principal place of business. (J.A. 4; 41, 47).

The Union was originally recognized as the exclusive bargaining representative of the Company's employees in 1961. (J.A. 5, 16; 235-236). Between 1961 and 1972 the Company and the Union were parties to four successive collective-bargaining agreements, the last of which expired in August 1972 (J.A. 5, 16; 95, 114, 236). The Union struck on September 5, 1972 after rejecting the Company's final offer which included a 20 cent per hour wage increase, a $2 per worker per week increase in the Company's insurance contribution, and one additional vacation day. The Company and the Union met again on November 1, 1972 but no bargaining took place, since the Company was simultaneously challenging the Union's representative status. The Company insisted that all discussions at that meeting be off-the-record - that is, not considered as collective bargaining - and the Union refused to participate on that basis. Thereafter, on January 23, 1974 the Board ordered the Company to bargain with the Union. *Romo Paper Products Corp.*, 208 NLRB 644 (1974), enf'd by default judgment of this Court in No. 75-4006 on March 31, 1975.

Pursuant to the Board's order, the Union, on February 1, 1974,[4] requested bargaining and submitted a written proposal for specific increases in wages and benefits (J.A. 6, 17-18, 125-126). The Company responded to this communication on March 1, and a bargaining meeting was scheduled for March 11 (J.A. 239-242).

### B. The Company's dilatory bargaining tactics

At the meeting on March 11, the Company's principal spokesman was its attorney, Robert Dinerstein; the Union's principal spokesman was its vice

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[4] All dates hereafter are 1974 unless otherwise indicated.

president, John Danetra (J.A. 6, 18; 234-235, 242-243, 368). The meeting, at the offices of the Company's attorneys, was scheduled for 3:00 p.m., but when the Union negotiators arrived, Dinerstein informed them that the Company's president, Samuel Roth, would be late. The meeting began at 3:45 when Roth arrived (J.A. 19; 242-243). Dinerstein told the Union negotiators that he had not read the expired contract or the Union's current proposals. Dinerstein purposefully had not asked Roth for a copy of the old contract in advance of the meeting because "[t]hat would be completely adverse to [his] bargaining procedure" (J.A. 18; 201, 417, 420). When the Union attempted to discuss some of its proposals, Dinerstein said, "Well, I can't really give you any answers because I don't have a copy of the previous contract" (J.A. 244, 417). The Union thereupon provided him with a copy of the contract and proceeded to discuss its proposals (J.A. 18; 244, 418). Dinerstein stated that it would be impossible to discuss wages at that time, and rejected all of the Union's other proposals without making any substantive response to them (J.A. 18; 245, 249). The Company did provide the Union with a written proposal for a management rights provision to be discussed at some future meeting, and Dinerstein undertook to contact the Union to schedule a second meeting (J.A. 127-128, 249-251, 428).

When no communication had been received from Dinerstein, the Union, through its attorney, Daniel Palmieri, wrote Dinerstein requesting the resumption of negotiations (J.A. 146, 174). Dinerstein finally agreed to a meeting to be held on April 1 (J.A. 19; 365-366).

Dinerstein arrived one hour later for the meeting on April 1 and announced that he could stay only an hour and a half (J.A. 19; 252-254, 366). Dinerstein then presented the Union with a lengthy written proposal, including: a reduction or elimination of most of the employee rights and benefits embodied in the preceding contract, most of which

had existed in earlier contracts dating back to 1961; a substantial reduction in starting wages; the previously submitted management rights clause; a new productivity standard; a new quality standard; and several new disciplinary rules (J.A. 19-20; 114-124, 129-138). The Union asked if these proposals were serious. Dinerstein replied that they were what the Company wanted (J.A. 23; 255-260, 266-268). The Union's chief negotiator, Danetra, asked why all the language from the parties' previous contracts had to be abandoned. Dinerstein replied that the Company wanted to write the contract the way it saw fit and that he was an expert at "ripping contracts apart" (J.A. 23; 260, 269).

Another meeting, on April 4, was held at the offices of Dinerstein's law firm. Again Dinerstein was 45 minutes late (J.A. 19; 269-270). The Company's proposals continued to be the focus of discussion. There was no significant movement on any of these proposals, and few specific explanations were given for the Company's proposed "language" changes (J.A. 24, 30; 271-287, 309). The Union asked why no money offer had been made by the Company. Dinerstein first replied that no dollars and cents offer could be made, but later stated that he could offer a wage and benefits package increasing Company's per hour labor cost by 10 cents (J.A. 24; 166, 225). Dinerstein admitted that this offer was unrealistic and that he made it simply to persuade the Union to discuss other "language" problems (J.A. 378-379). In a letter summarizing these negotiations the Company reaffirmed its intentions to postpone serious bargaining on economic issues until all "the tangential matters [were] resolved" (J.A. 24; 182).

The Company again took responsibility for contacting the Union to schedule the next negotiating meeting (J.A. 167). On April 16 the Union's attorney, Palmieri, wrote to Dinerstein reminding him that the Union was awaiting his selection of a date for the next bargaining session

(J.A. 168, 184). Dinerstein did not reply until April 30, and at that time, selected May 9 as the date for the next meeting. The meeting was held at Palmieri's office, but Company President Roth was between 35 and 45 minutes late (J.A. 19; 169, 227). Dinerstein did not inform the Union that he was prepared to proceed with negotiations in Roth's absence until Roth appeared (J.A. 227). Dinerstein then announced that he was going to leave in two hours (J.A. 169). No substantive progress was made at this meeting and the Union suggested mediation (J.A. 25-26; 169-172). Although the Company agreed to consider mediation, it later rejected the idea in a letter dated May 23 (J.A. 26; 188-189). Dinerstein again undertook to be in contact with the Union to schedule another meeting (J.A. 172, 189).

On June 25, Palmieri wrote to Dinerstein noting that since no date for a bargaining session had been advanced by the Company, he was suggesting a meeting on July 9, 10, 11, or 12 (J.A. 190). The next and final meeting was held on July 31 (J.A. 7, 26; 283-284). The Union again requested that the Company 'talk money", but the Company again refused until it could "get all the language out of the way" (J.A. 26; 284-286). No agreements were reached at this meeting, and the parties scheduled another meeting for August 15 "subject to confirmation from Mr. Roth", the Company President (J.A. 26-27; 191-193, 286-293, 359). When no confirmation was forthcoming, the Union's chief negotiator, Danetra, made another appointment for August 15, and so informed Dinerstein (J.A. 28; 195). Palmieri advised Dinerstein that the Union would be available any time after August 28, and asked for a new date. On September 11, Dinerstein suggested either September 23 or 25 (J.A. 28; 195, 197). The meeting never took place because Dinerstein claimed that the Union's letter of September 16, selecting the September 25 date, reached him too late (J.A. 28; 198-199). To date, the Company has not contacted the Union to schedule another meeting. The Union made no

further efforts to schedule negotiating meetings after the instant unfair labor practice was scheduled for hearing on October 15 (J.A. 3, 28; 232).

### C. The Company's substantive bargaining positions evidence an intent to avoid agreement

The substantive issues which have divided the parties since the start of negotiations on March 1 are as follows:

#### 1. Recognition and Union Security

The collective bargaining unit, as defined by the Board's previous bargaining order, embraced all the Company's employees at the 36th Street plant involved herein except office clericals, guards and supervisors.[5] The recognition clauses in all the preceding contracts back to 1961 had tracked this unit definition and provided that the Company recognized the Union as the exclusive representative of all the employees in the plant (J.A. 16; 49, 73, 95, 116).

In this round of negotiations, the Company proposed a recognition clause at variance with the unit defined as appropriate in the Board's bargaining order. The Company's proposal would grant the Union recognition as representative of employees in existing positions, but would specifically deny it such recognition with respect to employees in *any* new jobs (J.A. 21-22, 31; 129-130). The Company explained its position by stating that it ruled itself, and that it should be able to decide who works in the plant and, in summary, that "this is the Company's proposal" (J.A. 255-257, 261).

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5 *Romo Paper Products Corp., supra,* 208 NLRB at 655.

Throughout the negotiations the Company remained adamantly opposed to the inclusion of a union security clause, even though such clauses had been included in all the previous contracts (J.A. 22; 49, 74, 96, 116, 130, 259-260, 263, 400).

**2. Seniority and Job Security**

In contrast to former contracts which provided that seniority should govern layoffs, reinstatements and job bidding (J.A. 22; 59-62, 84-87, 105-106, 116-117), the Company proposed that these matters should now be within its sole discretion (J.A. 22; 131-132, 206-207). Similarly, while the previous contract provided for the preservation of work currently or previously performed by unit employees (J.A. 19; 116), the Company now now insisted that work assignments should be made a matter within the Company's sole discretion (J.A. 130). The Union rejected these proposed changes, and the Company did modify its position with regard to seniority, agreeing that seniority would apply "where practicable" and dropping its demand that the Company be vested with sole discretion to determine this (J.A. 264-265). In other respects the Company made no changes in its positions on these issues, and offered general explanations for its positions such as it wanted to operate as it saw fit (J.A. 29-32; 207, 262, 266-269).

**3. Management Rights**

The management rights provision which the Company submitted at the parties' first bargaining session, and continued to demand, gave it the exclusive right to determine, *inter alia:* reductions or relocation of operations anywhere in the world for any reason; abolition or change of

existing jobs, job descriptions, and work procedures; increasing or decreasing the number of jobs or employees; assignment of work and work schedules; subcontracting out or transferring any work whether done by employees in the bargaining unit or otherwise; transferring employees from job to job and from shift to shift and changing their work schedules; and making and changing work rules. Exercise of these management rights would not be reviewable through the arbitration procedures unless the agreement specifically provide to the contrary, and the Company did not offer to provide to the contrary as to any of the rights listed above (J.A. 20-21; 127-128).

**4. Current Benefits**

While the Company initially proposed elimination or substantial reduction in most of the employee benefits provided in the previous contracts, it subsequently modified its position at the May 9 meeting. Dinerstein then revised the Company's proposal to provide that current benefits would be retained by present employees and the proposed reduction in benefits would apply to all employees hired after any agreement might be reached (J.A. 25; 189, 337, 374-375, 390-394). Dinerstein specified that the "current employees - current benefits" provision would apply with respect to holidays, vacations, severance pay, medical insurance, and pensions (J.A. 7, 25; 230, 395). The Union's chief negotiator had some difficulty understanding this proposal and inquired if the Company was suggesting that the Union negotiate two contracts -- one for current employees and one for future employees. Dinerstein confirmed that this was precisely what he was suggesting (J.A. 25-26; 342-349, 376).

### 5. Wages

Pursuant to the contract that expired in 1972, the wage rates for bargaining unit employees, as of September 1, 1971, ranged from $2.60 to $4.20 per hour (J.A. 124). The Company's final offer preceding the strike in November 1972 provided for an average increase in these rates of $.20 per hour and also provided for increases in benefits. *Romo Paper Products Corp., supra,* 208 NLRB at 647. When negotiations resumed in 1974 pursuant to the Board's order, the Company offered wage rates ranging from $1.80 to $2.00 per hour (J.A. 20; 136-137, 254). Despite the Union's protests that this was not only a substantial wage cut but below the applicable State and Federal minimum wage laws, the Company did not move from this position until April 4 (J.A. 32-33, 35; 166, 254). At that time Dinerstein offered a wage and benefit package totalling $.10 per hour but admitted that he did not regard this as a realistic offer (J.A. 378-379). Thereafter, the Company continued to refuse to discuss wages until the "language" and "tangential" items were settled (J.A. 24; 182, 284-286, 378).

### 6. Other Items

*Vacations.* In addition to reducing the ratio of earned vacation time to time in service, the Company sought to obtain a forfeiture of earned vacation rights for any employee who was discharged for cause (J.A. 121-122, 135). Dinerstein explained this proposal to the Union by stating that "where an employee is discharged for cause we can see no reason why he should be rewarded." (J.A. 221). The Company also proposed to eliminate the employees' existing year-end paid vacation

between Christmas and New Year's Day (J.A. 121, 134, 282-283).

*Severance pay.* The Company proposed: a substantial reduction in the schedule of severence benefits per year of service; an increase in the waiting period before severance pay would be due (from 30 days to 90 days); a waiver of severance pay in the event of either bankruptcy reorganizations, or geographical plant moves of less than 75 miles (later modified to 30 miles) (J.A. 118, 132, 275-277).

*Operation of machines.* The expired contract had provided that machines normally operated by journeymen in skilled job classifications must be operated by such journeymen except in an emergency (J.A. 118). The Company proposed to change this clause so as to provide that the Company's unilateral determination that an emergency exists should not be subject to the grievance-arbitration provision (J.A. 118-119, 132, 272-273).

## II. THE BOARD'S CONCLUSION AND ORDER

Based on the foregoing facts the Board found that the Company's overall bargaining conduct violated Section 8(a)(5) and (1) of the Act (J.A. 31-35).[5]

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[5] The Board reversed the Administrative Law Judge, who had recommended dismissal of the complaint in its entirety. Conclusions, interpretations, law and policy are open to full review by the Board, which is to give the Administrative Law Judge's findings such weight as in reason and experience they deserve. See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494-496 (1951). In reversing the Administrative Law Judge, the Board differed only on the legal conclusion to be drawn from the substantially uncontested facts and not on any substantial questions of the credibility of the witnesses. Further, as the Board, not the Administrative Law Judge, carries the ultimate responsibility for striking the aforementioned balance between the conflicting rights, and as the Board's decision was neither "illogical or arbitrary" *(Falcon Plastics-Division of B-D Laboratories, Inc. v. N.L.R.B.*, 397 F.2d 965, 967 (C.A. 9, 1968)), that decision ought not be disturbed. See *Crown Central Petroleum Corp. v. N.L.R.B.*, 430 F.2d 724, 730 n. 23 (C.A. 5, 1970).

The Board's order directs the Company to cease and desists from the unfair labor practices found, and from interfering with, restraining, or coercing employees in any other manner in the exercise of the rights guaranteed to them by the Act (J.A. 35-36). Affirmatively, the Board's order requires the Company to bargain in good faith with the Union and to post the appropriate notices (J.A. 36-39).

## ARGUMENT

### SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN IN GOOD FAITH

Under Section 8(a)(5) of the Act it is an unfair labor practice for an employee "to refuse to bargain collectively with the representative of his employees . . . ." Collective bargaining is defined in Section 8(d) of the Act as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . ." As this Court in *Continental Insurance Company v. N.L.R.B.*, 495 F.2d 44, 47-48 (1974), stated:

> The duty. . . to bargain collectively does not obligate a party to make concessions or yield a position fairly maintained [citations omitted]. On the other hand, the parties are obligated to do more than merely go through the formalities of negotiations. . . . To conduct negotiations as a kind of charade or sham, all the while intending to avoid reaching an agreement, would of course violate Section 8(a)(5) and amount to "bad faith" bargaining.

Thus, the requirement of "good faith" is designed to insure that the parties will negotiate in a manner which lends itself to the real possibility of reaching an accord. *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395, 402-403 (1952). Stated otherwise, "[T]here is a duty on both sides . . . to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement." *Globe Cotton Mills v. N.L.R.B.*, 103 F.2d 91, 94 (C.A. 5, 1939).

The determination of whether a party's bargaining conduct conforms to these standards has been entrusted in the first instance to the Board. The Board's assessment encompasses a review of the totality of the circumstances, including the manner in which negotiations are handled, to determine if the party charged has participated in the bargaining in good or bad faith. *N.L.R.B. v. General Electric Co.*, 418 F.2d 736, 756-757 (C.A. 2, 1969), cert. denied 397 U.S. 965, rehearing denied, 397 U.S. 1059. In examining the content of the bargaining proposals advanced the Board "must take cognizance of the reasonableness of the position taken by [the charged party]. . . in the course of bargaining." *N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (C.A. 1, 1953) cert. denied 346 U.S. 887. Accord: *Vanderbilt Products, Inc., v. N.L.R.B.*, 297 F.2d 833 (C.A. 2, 1961). Moreover, though a party's acts themselves might not independently constitute unfair labor practices, they may nevertheless support an inference that the party is not bargaining in good faith. *N.L.R.B. v. General Electric Co., supra*, 418 F.2d at 757; *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 264-267 (C.A. 2, 1963), cert. denied 375 U.S. 834. "Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail." *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 232 (C.A. 5, 1960).

In the present case, it is clear that the Company did not take its bargaining obligations seriously. After a hiatus in bargaining of over one year caused by the Company's unlawful refusal to meet and bargain with the Union, the Company agreed to resume bargaining on March 1, 1974, more than one month after the Board's bargaining order issued. The Company's chief negotiator, displaying what would become a characteristic lack of punctuality, arrived 45 minutes late for the first meeting. Pursuant to his bargaining "technique," Dinerstein, the Company's chief negotiator, unabashedly asserted that he was unprepared to bargain, that he had not read the Union's proposal, and had not even requested that the Company supply him with a copy of the preceding contract. At the conclusion of the first negotiating session and most subsequent sessions, the Company promised the Union that it would schedule another meeting. The Company never fulfilled these promises in a timely manner, thereby unnecessarily delaying productive bargaining and forcing the Union to remind Dinerstein of his commitment to suggest dates. Such tactics are clearly inconsistent with good faith bargaining. Cf. *A.H. Belo Corporation v. N.L.R.B.*, 411 F.2d 959, 968 (C.A. 5, 1969), cert. denied, 396 U.S. 1007; *N.L.R.B. v. West Coast Casket Company, Inc.* 469 F.2d 871, 874, 875 (C.A. 9, 1972).

When the Union did succeed in bringing the Company to the bargaining table on six occasions, Dinerstein refused to make any serious economic offer until all "language" and "tangential" issues were resolved. Moreover, the Company never explained, even though repeatedly requested to do so, why all the language of the previous four contracts was unacceptable. Dinerstein simply stated that he was an expert at "ripping contract apart." (J.A. 269). Indeed, the Company refused to give any reasonable explanations for most of its bargaining proposals,

thereby depriving the Union of any opportunity to explore them for purposes of identifying a common ground upon which agreement could be reached. The duty to bargain, courts have said, assumes "a common willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed to justify them on reason." *N.L.R.B. v. George P. Pilling & Son Co.*, 119 F.2d 32, 37 (C. A. 3, 1941); *Rapid Roller Co. v. N.L.R.B.* 126 F.2d 452, 459 (C.A. 7, 1942), cert. den., 317 U.S. 650. Accord: *N.L.R.B. v. Israel Putman Mills, Inc.*, 197 F.2d 116, 117 (C.A. 2, 1952).

Viewed on the whole, the Company's bargaining tactics – arriving late and leaving early; arriving unprepared; refusing to explain bargaining proposals; insisting on a complete alteration of the bargaining relationship developed between 1961-1972; refusing to discuss economic matters until all "language" and "tangential" matters were settled; and delaying bargaining sessions by assuming responsibility for establishing a date for the next meeting and failing to fulfill this obligation – evidence an intent to demonstrate that the Union was ineffective, and that the Union's efforts to obtain a contract would be futile.

As further evidence of the Company's unlawful intent, the Board properly relied on the nature of the Company's bargaining proposals. Most significantly, the Company unduly burdened the collective bargaining process by injecting into it issues which were not only nonmandatory but of questionable legality. In direct contravention of the Board's order to bargain with the Union as representative of a discrete unit of employees, the Company proposed to narrow the unit to employees in current job classifications. Thus the Company sought to preclude the Union from asserting its right to represent employees in new positions which might accrete to the unit. Such insistence upon a variance from the lawfully established unit without regard to the inappropriateness of the unit

proposed enters the realm of *per se* violations of the Act. Cf. *Douds v. International Longshoremen's Association*, 241 F.2d 278, 282-283 (C.A. 2, 1957); *Sperry Rand Corp. v. N.L.R.B.*, 492 F.2d 63 (C.A. 2, 1974). Indeed had the Union acceded to the Company's unit demand it might well have been found to have violated its duty to fairly represent all employees in the unit found to be appropriate by the Board. Similarly, the Union's acceptance of the Company's "current benefits" proposal whereby current employees would retain existing benefits, but new employees would receive substantially less, would arguably have constituted arbitrary conduct in violation of the duty of fair representation. See, *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

The Company's position on wages, or the absence of a serious position, also displays an intent to frustrate bargaining. *N.L.R.B. v. Patent Trader, Inc.*, 415 F.2d 190, 198 (C.A. 2, 1969). Aside from the fact that the Company admittedly refused to bargain over wages until all noneconomic matters were settled, the Company's wage proposals were so unreasonable as to negate a serious intention to bargain. Indeed the Company admitted that the proposals were "not serious." The intial proposal of sub-minimum wages, although only a temporary gambit, was calculated to dissipate any progress that might otherwise have occurred had a realistic offer been made. When that offer was replaced by an offer that was significantly less than the Company's final offer before it broke off negotiations in 1972, it was clear that the Company had no intention of entering into any give-and-take exchange on this or any other issue. This type of offer is itself an indication of a lack of good faith. *N.L.R.B. v. General Electric Co., supra*, 418 F.2d at 757. Indeed the Company admitted that its wage offer was a "gesture" to demonstrate that wage bargaining was meaningless at that time.

To insure that its message that employees would be better off without the Union and without any contract would not be misunderstood,

the Company advanced and insisted upon a broad management rights clause which would vest in the Company the right to change unilaterally hours and other terms and conditions of employment during the contract term. Thus, the Company would not agree to be bound by the terms of the contract while insisting that the Union waive its bargaining rights as to most issues during the term of the contract. The Company could hardly have expected this proposal to have been accepted or to have afforded the basis for discussion. *Vanderbilt Products, Inc. v. N.L.R.B., supra,* 297 F.2d at 834.

Finally, as exemplified by its vacation and severance pay proposals, the Company sought to substantially dilute existing benefits and replace them with benefits "so inadequate as to be patently disingenuous." *Continental Insurance Company v. N.L.R.B., supra,* 495 F.2d at 49.

In these circumstances, the Company's unrealistic, unlawful, and unexplained bargaining proposals and its dilatory bargaining strategy, admittedly designed to take advantage of what the Company viewed as the Union's weakness, do not evidence any serious intent to reach agreement. To the contrary, such evidence amply supports the Board's finding that the Company entered negotiations in bad faith with an intent to prevent agreement. Its conduct as a whole was what this Court has characterized as "stalling tactic[s] by a party bent upon maintaining the pretense of bargaining." *Vanderbilt Products, Inc. v. N.L.R.B., supra,* 297 F.2d at 834, quoting *N.L.R.B. v. Reed & Prince Mfg., Co., supra.* In such a case, the Board properly found irrelevant the Administrative Law Judge's conclusion that no impasse in negotiations had been reached. For, as this Court has recognized, proposals that are later withdrawn or modified may be part of an "overall effort to frustrate arrival at an agreement" and make "a mockery of bargaining procedures, delaying the outcome for several years." *Continental Insurance Company, v. N.L.R.B., supra,* 495 F.2d at 50. Accordingly as the Board stated: "Although no impasse

occurred, we do not see how the Union's willingness to continue negotiations in the face of such highly disadvantageous (and even unlawful) demands can be credited to the Respondent's asserted good-faith bargaining" (J.A. 35). It was sufficient that bargaining had reached a point which reflected "the Company's overall effort to frustrate arrival at an agreement." *Continental Insurance Company v. N.L.R.B., supra,* 495 F.2d at 50.

In sum, viewed in its entirety, "the record reveals that the Company pursued a pattern of tactics designed to delay the negotiations as long as possible, to denigrate and undermine the Union, to make it impossible for the Union to reach a collective bargaining agreement without virtually surrendering its right to represent the employees in disputes over working conditions, and to make it appear to the employees that they would be worse off with Union representation and a collective bargaining agreement than if they had neither." *Continental Insurance Company v. N.L.R.B., supra,* 495 F.2d at 48.

## CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should enter enforcing the Board's order in full.

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| Respondent. | ) | |

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 29th day of March, 1976.